

STATE OF MICHIGAN
IN THE SUPREME COURT

KEITH TODD,

Plaintiff-Appellant,

v

NBC UNIVERSAL (MSNBC),

Defendant-Appellee

and

EASTPOINTE POLICE DEPARTMENT,
and A-ONE LIMOUSINE

Defendants.

Supreme Court No.

Court of Appeals No. 323235

Wayne County Circuit Court
Case No. 14-004589-CZ

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APPELLANT KEITH TODD'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction under MCR 7.303(B)(1) to grant leave to appeal from the Court of Appeals' unpublished opinion entered on December 10, 2015.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Plaintiff Keith Todd seeks leave to appeal the Court of Appeals' December 10, 2015 opinion affirming the July 30, 2014 Wayne County Circuit Court judgment in favor of Defendant NBC Universal (MSNBC), as well as the trial court's inaction on Plaintiff's motion to amend his complaint. The grant of summary disposition by the trial court dismissed all of Plaintiff's claims on the basis that they were all barred by the one-year statute of limitations period applicable to defamation, despite the other torts pled having longer statute of limitations periods. In addition, Plaintiff attempted to amend his complaint after summary disposition, but the trial court refused to allow a hearing to take place. Mr. Todd respectfully requests that this Court grant leave to appeal and reverse the lower court, or, in the alternative, peremptorily reverse the lower court on these issues.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court, in evaluating the tort of intentional infliction of emotional distress' element that the alleged conduct by the Defendant was extreme and outrageous, should include the *context* of Defendant's actions and the *position of authority* that Defendant holds to conclude that the issue is one for the trier of fact.

Court of Appeals says:	No
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Plaintiff Keith Todd says:	Yes
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Defendant NBC Universal (MSNBC) says:	No
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Trial court did not address this issue.

2. Whether the trial court's refusal to permit a hearing on Plaintiff's motion to amend his complaint was an abuse of discretion, particularly in light of the Court of Appeals' implication that the statute of limitations period of false light invasion of privacy was greater than that of defamation and therefore not expired.

Court of Appeals says:	No
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Plaintiff Keith Todd says:	Yes
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Defendant NBC Universal (MSNBC) says:	No
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Trial court refused to address the issue.

INTRODUCTION AND REASONS FOR GRANTING LEAVE

Plaintiff Keith Todd was thrust into the national spotlight when Defendant NBC Universal (MSNBC) (hereafter “MSNBC”) broadcast an episode of its television show, “Dash Cam Diaries,” that replayed the events of a police dash-cam video depicting the violent arrest of an individual named Todd Keith. Keith Todd’s name and photograph were erroneously displayed in this episode, and he was identified as being the individual who was shown stealing a vehicle, evading police, running through a McDonald’s restaurant on foot without his shirt on, and ultimately being tased in the back of said vehicle by the local police. However, Plaintiff was in no way involved in this series of events and was not the person depicted in the video.

Defendant MSNBC has acknowledged that it falsely identified Plaintiff as the perpetrator in its television show, yet Plaintiff has been barred from pursuing his legitimate claims. Plaintiff’s case in the circuit court was cut short with no opportunity for discovery when that court, pursuant to the Defendant’s motion for summary disposition, took the position that the statute of limitations period of one year that applies to defamation also bars the pursuit of other related torts, despite those other torts being subject to different periods of limitation.

The Court of Appeals agreed with Mr. Todd’s argument that a three-year statute of limitations period applies to the tort of intentional infliction of emotional distress and that the trial court erred in granting summary disposition on statute of limitations grounds. The Court of Appeals, however, upheld the trial court’s dismissal of Mr. Todd’s case on the grounds that the tort of intentional infliction of emotional distress includes an element that the defendant’s actions must be “extreme and outrageous” and that in this case, MSNBC’s actions did not rise to that level. This decision was based, in part, on the unsupported conclusion of fact by the panel that MSNBC’s actions were a mere “mistake,” despite no evidence being on the record that warrants

such a conclusion, and Plaintiff's pleadings asserting otherwise. The Court of Appeals did not apply existing case law when evaluating Mr. Todd's claim, resulting in an erroneous conclusion.

Additionally, the Court of Appeals, despite concluding that different torts with different statute of limitations periods can be pled independently, ruled that the trial court's refusal to even permit a hearing on Mr. Todd's attempt at amending his complaint was not an abuse of discretion. In other words, while Mr. Todd admits that the timing of his motion would have been more convenient if it had been before the trial court's grant of summary disposition, the Michigan Court Rules explicitly state that the court *shall* grant leave to amend, absent prejudice to the defendant or futility. The Court of Appeals found no such prejudice or futility, but relied on a case whose facts are diametrically opposed to those in this case to support its position. Furthermore, the Court of Appeals ignored case law from this Court, concluding that, absent any record in the trial court explaining the court's refusal to permit amendment, there was an abuse of discretion. Not only is there no record of the reasons for the trial court's refusal to permit amendment of Plaintiff's complaint, the trial court refused to permit a hearing based on its erroneous view of the statute of limitations periods.

As a result of the rulings of both the trial court and the Court of Appeals, Plaintiff is suffering a significant injustice. He has suffered substantial and ongoing damages to his mental health, which justify his substantial and legitimate claims for multiple torts against MSNBC. He was severely damaged by the invasion of privacy by MSNBC which was thrust on him without warning, and that company benefited from its actions while harming Mr. Todd. Despite the damage inflicted on Plaintiff, he is being barred from pursuing those claims, not only based on a misapplication of the standards contained in Michigan law for evaluating the elements of

intentional infliction of emotional distress, but also because of the trial court's refusal to follow the mandatory language of the Michigan Court Rules in granting leave to amend his complaint.

BACKGROUND

Dash Cam Diaries Television Show

Defendant MSNBC is a national television network that airs a variety of entertainment programming, including the series at issue in this case, titled “Caught on Camera: Dash Cam Diaries.” (Def’s Sum Disp Aff of Ainsley Binder, attached as Exhibit D.) In an episode of this series that first aired nationwide on August 7, 2011, a lengthy segment depicted the theft of a limousine and the subsequent police pursuit of the suspect, as recorded by the “dash cam” of a police vehicle. (*Id.*) The segment included commentary both from members of the Eastpointe, Michigan Police Department and the owner of the limousine company, A-One Limousine. The voiceovers and commentary provided a mocking description of the incident both in the dash cam video and of the suspect who allegedly committed the act being depicted.

The segment built a story of the theft of an \$80,000 limousine that was then located a few days later by the owner of A-One Limousine. He contacted police when he found his stolen limousine at a local gas station and then engaged in a fight with the suspected car thief. At this point, the police dash cam video provided a visual depiction of the ensuing situation, including the alleged car thief having his shirt ripped off, his flight from the scene to a neighboring McDonald’s restaurant, his escape from McDonald’s by breaking through a window, his return to the back of the limousine, and his final subduing by being “blasted” with police tasers.

Voiceovers and commentators on the video stated the following, in part:

Officer 1: He was driving around to strip clubs, casinos, and inner-city Detroit picking up various people that he’d just stop on a street corner and say ‘Hey, you wanna get in?’ And these people would provide him with drugs... Basically he had a kind of mobile party going on, in the back.

Voiceover: It turns out the suspect, 28 year old Keith Todd, is a seasoned car thief.

(Photo of Plaintiff Keith Todd is displayed on screen in error).

Officer: He was imprisoned for a couple years, for auto theft, RNC, receiving and concealing stolen property (unintelligible)...

Voiceover: But the big question perplexing the officers: why would Keith Todd jump into the back seat of an empty limousine? Police found out that he did not have a weapon there.

Officer 2: It ended up that he was highly intoxicated; it's possible that he thought someone was going to drive him away from all the bad things that were happening to him. (laughs)

Officer 1: It's definitely not the smartest crime in the world. (laughs)

Of course, the problem with this segment is that the producers of the program are depicting an individual who had nothing to do with the events described. Keith Todd is not a car thief, and the photo and personal information used in this segment are not that of the perpetrator. They are that of an innocent man who has suffered severe mental anguish as a result of Defendant MSNBC's reckless and irresponsible reporting. (Compl ¶¶ 20, 21, attached as Exhibit E.) In fact, the actual suspect was named Todd Keith, and MSNBC had apparently not done the appropriate verification to ensure that it was reporting the dash cam video facts correctly, even to the point of using the wrong individual's photograph to identify the suspect being shown in the video segment.

Despite these substantial errors in judgment, diligence, and fact checking, the episode was re-aired an unknown number of times and sold through an unknown number of online video

sales services, such as Amazon.com. Plaintiff subsequently discovered the re-airing of this episode in November of 2013 and again in January of 2014. (*Id.* at ¶¶ 16-20.) Plaintiff was shocked that his name and likeness were being aired nationally—and repeatedly—as belonging to a felon, car thief, and the butt of jokes. Plaintiff was approached and questioned on myriad occasions by friends and acquaintances, both his own and those of his uncle, with whom he lives. (*Id.* at ¶¶ 22-24.) Plaintiff was humiliated and suffered severe emotional distress as a result of Defendant's program, including trembling hands, stress-induced insomnia, heightened anxiety, headaches, inconsolable weeping, nausea, nightmares, and loss of appetite. (*Id.* at ¶¶ 28, 40, 49.)

In February of 2014, MSNBC received a demand for retraction from Plaintiff's attorney and MSNBC complied, re-airing the episode on February 23, 2014 with the requested retraction. (Aff of Ainslie Binder, Ex D.) Plaintiff then filed this suit on April 9, 2014 in Wayne County Circuit Court.

The Trial Court's Dismissal

Plaintiff's suit included four civil counts: a) defamation; b) negligent infliction of emotional distress; c) intentional infliction of emotional distress, and d) negligence. All counts were levied against all three defendants, NBC Universal (MSNBC), Eastpointe Police Department, and A-One Limousine. Prior to any discovery having begun, Defendant MSNBC moved for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8) with the primary argument that the relevant statute of limitations for defamation, being one year, had expired since the original airing of the episode, thus all related civil counts were barred as well, despite those other counts having longer statute of limitations periods of at least three years. The Eastpointe Police Department also moved for summary disposition under the theory that the wrong party

was being sued, and, in any event, was immune as a result of governmental immunity. Defendant A-One Limousine never filed an answer to the complaint.

A hearing was held in Wayne County Circuit Court on July 25, 2014, at which Judge Macdonald granted all defendants' motions for summary disposition, accepting MSNBC's theory that all tort claims were barred against MSNBC under the statute of limitations, and that Plaintiff's other counts were an attempt to "get around" defamation. The court's reasoning was an acceptance of MSNBC's summary disposition argument that different torts arising out of the same set of facts are subject to the shortest applicable statute of limitations. (7/25/14 Sum Disp Tr 11, attached as Exhibit B.)

On July 30, 2014, the Circuit Court's final order was issued, dismissing all of Plaintiff's claims, with prejudice. (7/30/2014 Order, attached as Exhibit A.)

Plaintiff then attempted to amend his complaint, pursuant to MCR 2.116(I)(5). Plaintiff's attorney conferred with opposing counsel to set a mutually-agreeable hearing date and scheduled a hearing for September 26, 2014. Plaintiff's attorney filed the motion with the court clerk and then attempted to obtain an ePraecipe cover sheet, which was rejected by the clerk's office since the case was then in an administrative "closed" state. Plaintiff's attorney then attempted to contact the courtroom, as instructed by the clerk's office, and was told that no hearing would be had and that the judge would not consider the matter. (Pl's Proposed Seven Day Order, attached as Exhibit F.) This case's Claim of Appeal was then filed on August 19, 2014 in order to preserve Plaintiff's right to appeal. Plaintiff subsequently filed a seven day order with the trial court, pursuant to MCR 2.602(B)(3), in order to formalize the court's previous decision to refuse to hear Plaintiff's motion, but the court did not act. (*Id.*)

The Court of Appeals Panel Affirms

Plaintiff appealed only the dismissal of the count of intentional infliction of emotional distress as to Defendant MSNBC as well as the trial court's refusal to permit a hearing on his motion to amend his complaint to add counts of false light invasion of privacy and appropriation. Plaintiff argued that the tort of intentional infliction of emotional distress has a three-year statute of limitations period and that it could be pled independently of defamation, which has a one-year statute of limitations period. Michigan case law is clear in that both torts may be pled simultaneously or independently, even if the underlying facts are the same for both torts. Plaintiff further argued that the trial court erred two-fold in not permitting a hearing on his motion to amend his complaint, not only because the trial court erred in dismissing all of Plaintiff's claims in the first place based solely on the statute of limitations period applicable to defamation, but also because the trial court did not make any findings of prejudice or futility in refusing to permit amendment.

The Court of Appeals, in its December 10, 2015 unpublished decision (Exhibit C), agreed with the Plaintiff that separate torts with different statute of limitations periods can be pled independently. Furthermore, the panel agreed that the trial court should not have dismissed Plaintiff's intentional infliction of emotional distress claim based on the statute of limitations issue pursuant to MCR 2.116(C)(7). However, the panel upheld the trial court's decision on the ground that Defendant's actions did not rise to the level of "extreme and outrageous" conduct that is required of defendants to permit the issue to be submitted to a trier of fact; therefore, Plaintiff's claim for intentional infliction of emotional distress would have been properly dismissed under MCR 2.116(C)(8).

Finally, the Court of Appeals found that Plaintiff's attempt to amend his complaint to add the torts of false light invasion of privacy and appropriation was barred because the trial court did not abuse its discretion in failing to permit a hearing on the motion.

STANDARDS OF REVIEW

A trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(8) is reviewed de novo. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). All well-pleaded factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

Decisions granting or denying motions to amend pleadings are within the sound discretion of the trial court, and reversal is only appropriate when the trial court abuses that discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647, 655 (1997). While, admittedly, the parameters of the judge's discretion are incapable of precise delineation, a judge abuses this discretion when he utilizes it to obviate a recognized claim or defense. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134, 138 (1973). A trial court necessarily abuses its discretion when it makes an error of law. *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399, 404 (2013).

ARGUMENT

I. The Court of Appeals panel made an unsupported conclusion of fact and did not address case law that examines the context and relative position of authority of a defendant in evaluating whether conduct is extreme and outrageous enough for a claim of intentional infliction of emotional distress to survive a motion for summary disposition.

Mr. Todd's argument in the Court of Appeals revolved around whether the tort of intentional infliction of emotional distress was subject to a different statute of limitations period when both that tort and defamation were pled in the same complaint. The trial court dismissed Mr. Todd's entire case based on the reasoning that his pleading of multiple torts was merely an attempt at "getting around" the statute of limitations period of one year applicable to defamation. While the panel below concluded that the three-year period of limitations period does apply, even when simultaneously pled with defamation, it ruled on other grounds that Mr. Todd's claim for intentional infliction of emotional distress was properly dismissed by the trial court. The court below erred in two ways: first, in making a finding of fact that isn't supported by the record, and more importantly, by not addressing prior precedent when applying the elements of the tort.

The tort of intentional infliction of emotional distress consists of four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905, 908 (1985). Liability attaches only when a plaintiff can demonstrate that the defendant's conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. A defendant is not liable for mere insults, indignities, threats, annoyances, petty oppressions, or

other trivialities. *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675, 689 (2003) (internal citations and quotation marks omitted).

In reviewing claims of intentional or reckless infliction of emotional distress, it is generally the trial court's duty to determine whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Where reasonable minds may differ, whether a defendant's conduct is so extreme and outrageous as to impose liability is a question for the jury. [*Id.* at 197.]

Firstly, the Court of Appeals ruled that the first element of intentional infliction of emotional distress was not met, because MSNBC's conduct did not rise to the level of extreme and outrageous conduct required, and the court likened the Dash Cam Diaries episode to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Court of Appeals Opinion, p 6, attached as Exhibit C. The court's decision was based, in part, on its assertion that "Plaintiff asserted that defendant mistakenly disseminated false information about him that incorrectly identified him as a criminal." *Id.*

This statement is an inaccurate characterization of Mr. Todd's allegations. Mr. Todd at no time alleged that MSNBC's behavior was a mere "mistake." In his original complaint, Mr. Todd alleged that MSNBC acted "with knowledge of the falsity of the statements or in reckless disregard of their truth or falsity," and that MSNBC's conduct was "intentional." Compl ¶¶ 31, 36. Furthermore, in Mr. Todd's proposed first amended complaint, he further alleged that MSNBC's actions were "unreasonable and highly objectionable, attributing false and outrageous criminal activity to his name and photograph." Pl's Proposed First Amended Compl, ¶ 30, attached as Exhibit G.

No evidence was introduced by MSNBC at the trial court alleging that its behavior was a mere “mistake.” In the attachments to MSNBC’s motion for summary disposition, the affidavit provided by an employee of MSNBC merely discussed the process of pulling the episode in question from circulation and publishing an apology. See Exhibit D. There is no discussion of the activities of MSNBC that lead to the publication of Mr. Todd’s name, age, and photograph in connection with an instance of criminal behavior completely unrelated to Mr. Todd. The Court of Appeals made a conclusion of fact that was neither made by the trial court nor supported by any evidence on the record.

Secondly, the panel below, in raising the “extreme and outrageous” issue, did not address the movement toward the application of the *context* of the defendant’s conduct, nor the defendant’s *relative position* as to the plaintiff, as addressed by prior Court of Appeals panels. While conduct that is not extreme or outrageous in isolation may not rise to the necessary level for a claim for intentional infliction of emotional distress to survive summary disposition, when a trial court does review the context of the actions by the plaintiff, such conduct may rise to the necessary level. While the Court of Appeals cited *Lewis* and other cases to make its point that a defendant’s conduct must be extreme and outrageous—and that MSNBC’s behavior was akin to a mere insult—the Court of Appeals has previously held that the *context* of the defendant’s actions is also important and determinative in finding that the defendant had crossed the threshold. The panel below did not address the essential issue of context. Furthermore, since this Court has not taken up this issue, courts below at times seem to be unsure as to its application.

In *Ledsinger v Burmeister*, 114 Mich App 12; 318 NW2d 558 (1983), the court grappled with a situation of determining when verbal insults could rise to the necessary level to support an

intentional infliction of emotional distress claim. The defendant in that case had hurled racist insults at the plaintiff when plaintiff purchased some auto parts from defendant.

The critical issue in this case is whether the defendant's conduct can be characterized as extreme and outrageous or whether, as defendant contends, the actions merely rose to the level of insult, indignity, threat, annoyance, petty oppression or triviality... It is essential in making this assessment to look to the context in which the remarks were made. *Although the Restatement acknowledges that the law in this area is in a stage of development, it points toward a contextual approach.* For example, the extreme and outrageous character of the conduct may arise from the position of the actor, his relation to the distressed party, or from his knowledge of peculiar susceptibilities of the distressed party. [*Id.* at 18, 19 (emphasis added).]

The court in *Ledsinger* found that, while racist insults would ordinarily not be considered extreme and outrageous, the context of the defendant's position of authority—being a store owner, and plaintiff's position as a customer—was enough to rise to the level of extreme and outrageous conduct so that the issue should be submitted to the trier of fact. *Id.* at 20, 21.

This contextual approach was further recognized and applied by the Court of Appeals in *Margita v Diamond Mortg Corp*, 159 Mich App 181, 189-190; 406 NW2d 268, 272 (1987). In *Margita*, defendant debt collector was making harassing phone calls to the plaintiff in an attempt to collect a debt that was not overdue, and had “a great deal of power to affect plaintiff's credit rating and future borrowing ability.” *Id.* at 190.

The extreme and outrageous character of the conduct may arise from the position of the actor or a relationship to the distressed party. For example, it may

occur through an abuse of a relationship which puts the defendant in a position of actual or apparent authority over a plaintiff or gives a defendant power to affect a plaintiff's interest. Whether a defendant's acts were sufficiently outrageous depends upon the context in which the defendant committed them. [*Id.* at 189, 190 (internal citations omitted).]

In this case, MSNBC had unique power over Mr. Todd's interest in being free from national and international publication of his name and likeness in connection with a criminal act that he had nothing to do with. Mr. Todd's interest in his mental well-being was attacked without any provocation or warning. MSNBC did not contact Mr. Todd in preparation for its television broadcast and recklessly published Mr. Todd's personal details without so much as a single attempt at verifying the information with Mr. Todd.

Similar conclusions supporting the view that the position of a defendant relative to a plaintiff in the outrageous conduct continue to be found by Michigan's appellate courts. "It is also unquestioned that the extreme and outrageous character of the challenged conduct may arise from the abuse of a relationship which . . . gives the defendant power to affect the plaintiff's interests." *McCahill v. Commercial Union Ins Co*, 179 Mich App 761, 768; 446 NW2d 579, 582 (1989).

As an additional example, in *Melson v Botas*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2014 (Docket No. 315014), p 5, the court found that while a teacher telling a student "why don't you just go kill yourself," was akin to a mere insult or indignity, "[defendant's] position as [plaintiff's] teacher and the classroom setting in which the offending conduct is alleged to have occurred, reasonable minds could conclude that her remarks were extreme and outrageous." See also *Burke v Detroit Pub Schls*, unpublished opinion per

curiam of the Court of Appeals, issued May 2, 2006 (Docket No. 262983), p 36, where the court noted that “the context of [defendant’s] acts is a decisive factor in this case.”

The Sixth Circuit Court of Appeals also addressed this issue in *Pratt v Brown Machine Co, Div of John Brown, Inc*, 855 F2d 1225 (CA 6, 1988) where the court referenced *Margita* and applied the same context standard: “We must consider [plaintiff’s] claim within the context of the events surrounding the . . . meeting, as well as his relationship at that time with [defendant’s principal].” *Id.* at 1239, 1240. The same court again addressed the issue when applying Michigan law in *Mroz v Lee*, 5 F3d 1016, 1019 (CA 6, 1993): “In assessing whether the alleged conduct is sufficiently extreme and outrageous, we are to look to the context of the alleged conduct, to the totality of the circumstances.”

The contextual approach is appropriate in this case. MSNBC is in a position of authority due to the fact that it owns and operates an extensive, worldwide television broadcasting and media empire that has the ability to not only provide accurate and timely news stories, but also to publish completely false and damaging information to a very wide audience. MSNBC, having such a great amount of authority and an “ability to affect plaintiff’s interests,” has a particular level of responsibility to wield its power with caution. That is not what happened in this case. It’s hard to imagine an organization with more ability to affect the life of an individual than a large media organization such as MSNBC. It is entirely appropriate for this Court to find that MSNBC’s position, relative to Mr. Todd, combined with MSNBC’s reckless conduct in publishing a completely false story, ostensibly about Mr. Todd, combined with the display of his name, age, and photograph, satisfies the necessary level of extreme and outrageous conduct required for the issue to be submitted to the trier of fact.

While several Court of Appeals panels have addressed the issue of context and relative position of the parties as they relate to intentional infliction of emotional distress, this Court has not. Notably, the panel below did not address these issues at all. It's important for this Court to solidify this rule into Michigan law so that future courts may have clear guidance and so that Mr. Todd may be able to proceed with his claim for intentional infliction of emotional distress to a finder of fact.

II. The Court of Appeals used sophistic logic and did not acknowledge precedent from this Court pertaining to a trial court's failure to hear a motion to amend a complaint.

As previously stated, the panel below ruled that Mr. Todd's claim for intentional infliction of emotional distress was improperly dismissed under MCR 2.116(C)(7). However, when it comes to the same panel's resolution of Mr. Todd's issue of amending his complaint, it concluded that Mr. Todd's claims for false light invasion of privacy and appropriation should be barred because the trial court did not abuse its discretion in denying Mr. Todd the opportunity to have a hearing on his motion. The panel noted that "Plaintiff offered, and offers this Court, no reason why these claims could not have been included in the original complaint or added when the case was pending." However, this isn't the standard applied by Michigan's courts—indeed, by this Court—when evaluating whether a plaintiff should be allowed to amend his complaint.

MCR 2.118(A)(2) permits a party to amend a pleading with leave of the court or with the consent of an adverse party. MCR 2.116(I)(5) states that if an opposing party's motion for summary disposition is granted under MCR 2.116(C)(8), the court "shall give the parties an opportunity to amend their pleadings . . ." Entry of a grant of summary disposition in favor of the defendant does not preclude amendment of the plaintiff's complaint. *Midura v Lincoln*

Consolidated Schools, 111 Mich App 558, 561; 314 NW2d 691 (1981). However, amendment must be by leave of the court. *Schimmer v Wolverine Ins Co*, 54 Mich App 291, 298; 220 NW2d 772 (1974). Generally, a motion to amend is granted unless it would be unjust or futile. *Burse v Wayne Co Medical Examiner*, 151 Mich App 761, 767; 391 NW2d 479 (1986). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 625; 403 NW2d 830 (1986).

In *Midura, supra*, the Court of Appeals ruled that a party should be able to amend his complaint when his previous claims were dismissed for failure to state a claim upon which relief could be granted—the current equivalent of MCR 2.116(C)(8). The court cited the U.S. Supreme Court in explaining that:

[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’ [*Foman v Davis*, 371 US 178, 182 (1962).]

None of these reasons apply here, and the panel below made no such findings or conclusions consistent with either *Midura* or *Foman*. And it should be repeated that the trial court made no such findings either.

Prejudice was defined by the *Midura* court as an amendment “which would prevent a party from having a fair trial, or [a] matter which he could not properly contest, e.g., when surprised. It does not refer to the effect on the result of the trial otherwise.” *Midura, supra*, at 562. The court went on to say that “[t]he allowance of an amendment is not an act of grace, but a

right of a litigant who can show that an amendment will not work an injustice on the opposing party.” *Id.* at 563. By allowing Mr. Todd to amend the complaint, MSNBC would not be prejudiced in any way, since MSNBC is already aware of this case and no discovery has yet been had. In no way would amendment cause MSNBC to have an unfair trial. Indeed, amendment would allow Plaintiff to fairly argue the merits of his claims and pursue the justice that he deserves without further impediment.

In this case, Mr. Todd was not even given the *opportunity* to amend his complaint. The trial court refused to permit Mr. Todd a hearing to present his justification for the proposed amendments. Michigan jurisprudence calls for the trial court to make specific findings on the record that lead to the denial of a motion to amend. This Court in *Labar v Cooper*, 376 Mich 401; 137 NW2d 136 (1965), remanded a case back to the trial court because the trial court did not make any specific findings in its decision to deny amendment of the complaint.

While the conclusions upon which the trial judge based his exercise of discretion are before us, his findings are not. *Consequently, we are unable to say whether he exercised his discretion properly.* The cases are remanded to the trial judge for further disposition in the light of this opinion. *In the event the motions are denied, such exercise of discretion should be supported by specific findings as to reasons for the same.* [*Id.* at 409 (emphasis added).]

The panel below did not address the issues of prejudice or futility, instead it solely relied on its own reasoning that there was “no reason these claims could not have been included in the original complaint.” This reasoning is contrary to Michigan case law.

In a case very similar to the one at bar, the Court of Appeals remanded the issue to the trial court when neither the opposing party alleged prejudice from a proposed amendment, nor did the trial court elucidate any findings of any such prejudice, as in this case.

It is not asserted by the defendants, and the trial court did not find, that further proceedings would result in any special prejudice to the defendants or that there was any bad faith or dilatory motive on the part of the plaintiff. We are satisfied that the plaintiff should be given an opportunity to amend his complaint and complete discovery. Accordingly, the case is to be remanded to the trial court for such procedures. [*Boje v Wayne Cnty Gen Hosp*, 157 Mich App 700, 709; 403 NW2d 203, 207 (1987).]

In this case, the panel below relied on sophistic logic to deny Mr. Todd an opportunity to continue with his case. First, the court stated that Mr. Todd's claim for intentional infliction of emotional distress was improperly dismissed under MCR 2.116(C)(7) and that it should have been more properly dismissed under MCR 2.116(C)(8). This would have triggered the mandatory language in MCR 2.116(I)(5) that says that a court "shall" give the parties an opportunity to amend their pleadings if summary disposition is granted under MCR 2.116(C)(8). Yet the trial court's sole justification for dismissing Mr. Todd's entire case was MCR 2.116(C)(7), and attempting to amend his complaint would likely have been met with the same erroneous conclusion by the trial court—that all of Mr. Todd's claims were time-barred due to the shorter defamation statute of limitations period. The trial court made an error of law when deciding to dismiss all of Mr. Todd's claims. "A trial court necessarily abuses its discretion when it makes an error of law." *Duncan, supra* at 723.

Yet the panel below, in concluding its opinion, relied on *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271, 276-277; 824 NW2d 573 (2012): “Plaintiff cannot demonstrate that ‘the outcome of the proceedings likely have been different’ if the trial court had considered its motion.” (Emphasis in original).

This rather cryptic citation ignores the panel’s own decision a mere three pages prior. Plaintiff’s attempt at amending his complaint to add counts of false light invasion of privacy and appropriation, both with three-year statute of limitations periods (the same as intentional infliction of emotional distress), would likely have been successful if the trial court had correctly applied the standard that the panel below itself had espoused.

Indeed, when one reviews the context of the *Richard* case, one will see that the case involved a plaintiff who didn’t even show up to his own motion hearing and that couldn’t have demonstrated the success of his motion on appeal because the underlying issues had already been decided by the trial court. In this case, Mr. Todd wasn’t even permitted a hearing, and the basis of the trial court’s refusal to grant a hearing was based on its erroneous view of Mr. Todd’s claims under MCR 2.116(C)(7). The reliance by the panel below on *Richard* is incongruent with the facts of this case and the procedural posture of Mr. Todd.

CONCLUSION AND RELIEF REQUESTED

Mr. Todd has legitimate and ripe claims against MSNBC. He attempted to pursue those claims but was barred by two erroneous rulings of the trial court. Mr. Todd wishes to pursue justice in his case against a company responsible for inflicting severe emotional and psychological problems upon him, as well as invading his privacy without any justification whatsoever—all for a profit—yet he has been barred from doing so along every step of the way.

Mr. Todd requests that his Court grant him the ability to pursue his legitimate claims. Furthermore, Mr. Todd requests that his Court explicitly adopt Michigan's appellate jurisprudence as it relates to applying a *context* and *position of authority* standard when evaluating intentional infliction of emotional distress claims. Finally, Mr. Todd requests that this Court correct the trial court and Court of Appeals' errors that have prevented from amending his complaint and pursuing his claims.

Therefore, Mr. Todd respectfully asks that his Court grant leave to appeal, reverse, and remand his case to the trial court. Alternatively, Mr. Todd asks that this Court peremptorily reverse.

Respectfully submitted,

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